No. 88-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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CLERK

ERNEST WINKLER, RAYMOND J. ASARO, FRANCES E. BAKER, RALPH N. CAPASSO, DAVID CLEARY, GERARD F. CONDON, LAURANCE CONTI, JAMES CUMMINS, JOHN P. DEVANEY, ROBERT DORRITIE, WILLIAM J. DOVENERO, DAVID P. DRURY, BRUCE W. ERICKSON, MICHAEL FIORILLO, HERBERT C. FISCHER, THOMAS E. FLYNN, MICHAEL P. FRISCH, HENRY W. FUHRMAN, AARON GRABER, FRANK GUSTAR HENKEL, JR., STANLEY D. JESSAMINE, JR., DENNIS KEATING, KIRK A. KOWALCHUK, PETER L. LAUDATI, JOSEPH LIOTTI, PETER P. LORENZO, NEAL M. McKENNA, RICHARD J. MARUCHEAU, ARTHUR MESSINGER, JOHN J. MORAN, WILLIAM R. MURPHY, THOMAS MURRAY, WARREN A. NAGLE, JOHN OEHM, JAMES A. OPALECKY, ANTHONY ORSANO, ROBERT PESCE, KENNETH J. PISCOPO, RICHARD PLOUFF, MICHAEL REHBERG, WILLIAM H. RITCHIE, ROBERT G. SCHILDHORN, C. BENJAMIN STIVALA, ERIK WIENER, FRED C. ZERILLI, and others similarly situated,

Appellants,

vs.

JOSEPH E. SPINNATO, individually and as Commissioner of the Fire Department of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OF STATE OF NEW YORK

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Questions Presented

1. Is a requirement that current public employees who are violating both state and local residency requirements must comply with these requirements within one year, even though current employees who are residents of the state but not the locality may continue to reside outside the locality until they move to new homes, rationally related to legitimate state interests?

2. Is a residency requirement for public employees consistent with the privileges and immunities clauses?[1]

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[1] The caption on the jurisdictional statement does not accurately identify all the parties to the proceeding in the New York Court of Appeals. It omits the State of New York, which participated as an intervenor-defendant in the Supreme Court of the State of New York, Queens County. The State of New York is an intervenor-respondent in this Court.

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Respondents.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OF STATE OF NEW YORK

JURISDICTION

The appropriate method to seek review of the order of the New York Court of Appeals is by petitioning for a writ of certiorari. 28 U.S.C.S. § 1257(a) (Law. Co-op. 1988). Former 28 U.S.C.A. § 1257(2) (West 1966), on which the appellants rely, was amended to delete the avenue of appeal from state court judgments, effective three weeks before the Court of Appeals issued its order.

Statement of the Case

1. A brief history of state and local residency requirements in New York State

For more than a century and a half, New York State has required state and local public officers to be state residents. *See* Rev. Stat. tit. 6, ch. 5, § 1 (1829). For nearly a century, it has required public officers of local governments to be residents of the locality as well as of the State. 1892 N.Y. Laws, ch. 681, §§ 3, 20.

As currently drafted, apart from express statutory exceptions, the Public Officers Law requires all state public officers to be residents of the state and all local public officers to be residents of both the state and locality:

> No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, . . . be a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen, . . . or within which his official functions are required to be exercised. . . .

N.Y. Pub. Off. Law § 3(1) (McKinney 1988). Under section 30(1)(d) of the Public Officers Law, a public office is deemed to have become vacant as soon as its incumbent ceases to be an inhabitant of New York State or of the political subdivision of which the officer was required to be a resident when chosen. N.Y. Pub. Off. Law § 30(1)(d) (McKinney 1988).

In 1962, the Legislature eased local residency requirements for New York City firefighters and certain other New York officials to permit them to live outside the City in six nearby counties: Orange, Putnam, Rockland, Westchester, Nassau, and Suffolk. 1962 N.Y. Laws, ch. 976, § 1 (codified at N.Y. Pub. Off. Law § 3(9) (McKinney 1988)). Section 30(5) of the Public Officers Law contains a similar exemption. N.Y. Pub. Off. Law § 30(5) (McKinney 1988). All New York City firefighters are informed of these state and local residency requirements when they apply, when they accept employment, and periodically thereafter. RA 14.[2]

After the New York City Fire Department became aware that several firefighters were violating the requirements of sections 3(9) and 30(5) of the Public Officers Law, it took administrative action requiring the firefighters currently violating the law to comply promptly. In April 1986, it issued a series of orders requiring all firefighters who were violating the residency requirements to notify the Inspector General by April 30, 1986, to move into a lawful county by May 30, 1986, and to have their families move into a lawful county by September 1, 1986, unless, "as a result of special circumstances, the member legitimately resides at a domicile different from that of his or her family." Order No. 46, Apr. 11, 1986; Order No. 41, Apr. 2, 1986, RA 15-17.

After the administrative deadline had expired, the Legislature amended sections 3 and 30 by adding subdivision 19 to section 3 and subdivision 5-a to section 30. 1986 N.Y. Laws, ch. 509, §§ 1, 2 (effective July 22, 1986). Under these amendments, effective immediately, all current employees then violating state and local residency requirements by living outside the State had one year to establish residence within the State; all current employees then residing in the State, but residing outside the locality, were permitted to continue to reside outside the locality. Section 3(19) provides:

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[2] "RA " indicates pages in the respondents' appendix in the New York Court of Appeals.

> Any person who resides in this state and who is currently employed as . . . a paid member of the uniformed force of a paid fire department . . . of a city of over one million population, shall be exempt from the provisions of subdivisions one, two and nine of this section upon compliance with the procedure set forth in this subdivision. Any person seeking to benefit from the exemption created by this subdivision shall notify his respective employer in writing of said intention within thirty days from the effective date of this subdivision and shall specify his then current residence address. The exemption created by this subdivision shall be applicable only to said actual designated residence and not to any residence that any subject currently employed member may thereafter establish; provided, however, that any such currently employed member who resides outside this state shall have one year from the effective date of this subdivision within which to establish residence as required pursuant to subdivisions one, two and nine of this section and comply with the notice requirements of this subdivision. Said residence shall constitute a lawful residence for all purposes notwithstanding any provision to the contrary of any general, special or local law, charter, code, ordinance, resolution, rule or regulation.

N.Y. Pub. Law § 3(19) (McKinney 1988) (effective July 22, 1986). Section 30(5-a) is virtually identical. N.Y Pub. Off. Law § 30(5-a) (McKinney 1988) (effective July 22, 1986).

2. Proceedings below

After the Fire Department issued its April 2 and April 11, 1986 orders requiring firefighters then violating the residence laws to comply, the Supreme Court, New York County granted a temporary stay of reporting obligations until May 30, 1986, and of the requirement to establish residence in the State until June 30, 1986. *See Mancuso v. Spinnato*, No. 9273/86, slip op. at 3 (Sup. Ct. N.Y. Co. May 13, 1986) (Baer, J.). RA33, RA36. The court denied any further relief. RA36.

The appellant firefighters ("plaintiffs") commenced this action against respondents Joseph E. Spinnato, individually and as Commissioner of the Fire Department of the City of New York, Edward I. Koch, individually and as Mayor of the City of New York, the Fire Department of the City of New York, and the City of New York ("City defendants") in a complaint dated November 20, 1986. A82.[3] In their amended complaint, dated May 7, 1987, the named plaintiffs claimed to be either out-of-state residents or employees who claimed to be residents of the state but maintained a residential dwelling outside of the State, which they jointly owned with their wives and were occupied by their families. A127, A129. They contended that the amendments to the Public Officers Law denied them equal protection, due process, the right to travel, and privileges and immunities of citizenship. A135-A148. The State of New York participated as an intervenor-defendant as of right pursuant to section 71 of the New York Executive Law and section 1012 of the Civil Practice Law and Rules to defend the constitutionality of the amendments.

The Supreme Court, Queens County granted the defendants summary judgment and declared sections 3(19) and 30(5-a) of the Public Officers Law constitutional. *Winkler v. Spinnato*, No. 04177/87 (Sup. Ct. Queens Co. July 9, 1987) (decision), 66-a.[4] It concluded that the amendments had a rational basis and were consistent with equal protection because nonresident public employees "could not have the loyalty, sense of accountability, and identity with the state and municipality that resident firemen had and, therefore, could not benefit the people of the state in the same manner" and that resident public officers "would spend their wages here, returning an economic benefit to those whose contributions pay the firemen's salaries." 78-a. It also concluded that the privileges and immunities claim was "without merit" because there was "no fundamental right to serve as a public employee of a particular state." 73-a.

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[3] "A ____" indicates pages in the plaintiffs' appendix in the Court of Appeals.

[4] "____-a" indicates pages in the appendix to the jurisdictional statement.

The Appellate Division, Second Department also concluded that all the plaintiffs' constitutional claims were "without merit" and affirmed the judgment. *Winkler v. Spinnato*, 134 A.D.2d 66, 68, 523 N.Y.S.2d 530, 532 (2d Dep't 1987), 22-a. It concluded that the distinction between residents and nonresidents had a rational basis and was, therefore, consistent with principles of equal protection because a state "may classify employees and the employees of its political subdivisions so as to encourage residence inside the State for any valid reason, including the obvious financial one." *Id.* at 75, 523 N.Y.S.2d at 537, 44-a. It also concluded that the amendments did not violate the privileges and immunities clause because public employment was not a privilege which bore upon the vitality of the nation as a single entity. *Id.* at 78, 523 N.Y.S.2d at 539, 52-a (citing *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 383 (1978)).

The Court of Appeals affirmed. *Winkler v. Spinnato*, 72 N.Y.2d 402, 530 N.E.2d 835, 534 N.Y.S.2d 128 (1988) (per curiam), 1-a. It stated that the amendments had several rational bases. Public employees who reside in New York were likely to benefit the state economically by spending their money in New York and contributing more in taxes than nonresidents. *Id.* at 406, 530 N.E.2d at 837, 534 N.Y.S.2d at 130, 7-a. In addition, "State residency requirements are premised on the belief that out-of-state residents do not have the same loyalty and commitment to the State as in-state residents." *Id.* at 406, 530 N.E.2d at 837, 534 N.Y.S.2d at 130, 7-a. The state could subordinate "its local interest to a limited degree, to accommodate those in violation." *Id.* at 406-07, 530 N.E.2d at 837, 534 N.Y.S.2d at 130, 8-a. Because out-of-state residents were already required to move in order to comply with the state residency requirement, there was

> little reason to excuse them from moving into one of the lawfully designated counties. Because, on the other hand, in-State residents need not otherwise move, they are not being required to do so for the sole purpose of moving into a lawful county. But if they move from their current in-State residence, however, they, like

> out-of-State residents, must do so in compliance with the local residency law.

Id. at 407, 530 N.E.2d at 837-38, 534 N.Y.S.2d at 130, 8-a. Thus, "[t]his limited accommodation to those who already satisfy the State residency requirement and, therefore, do not have to move for that purpose, is rational." *Id.* at 407, 530 N.E.2d at 838, 534 N.Y.S.2d at 130, 8-a-9-a. One judge dissented.

ARGUMENT

POINT I

BECAUSE A NEW YORK STATUTE REQUIRING NONRESIDENT FIREFIGHTERS TO BECOME RESIDENTS OF THE STATE AND LOCALITY IS FULLY CONSISTENT WITH EQUAL PROTECTION AND DUE PROCESS THIS CASE PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR REVIEW BY THIS COURT

New York State's requirement that current nonresident firefighters who have been violating state and local residency requirements comply with both requirements, while excusing current resident firefighters from complying with local residency requirements until they move from their current homes, is consistent with equal protection and due process. State residency requirements further legitimate state interests of limiting participation in the government to members of the community, fostering loyalty, and encouraging migration. Local residency requirements are also rational. Moreover, distinguishing between current resident public employees and current nonresident public employees in awarding benefits — such as the limited amnesty here — is rational. As shown below, the amendments to the Public Officers Law are consistent with these principles. Thus, the plaintiffs neither raise a substantial federal question, assuming that an appeal were available, nor demonstrate that special and important reasons exist warranting review by writ of certiorari.

It is rational for New York to want all of its firefighters — public officers — to live in New York State. It is a basic principle that a state has a legitimate interest "in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.' " *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)). *See also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 282 n.13 (1985) (recognizing that without certain residency requirements the state would cease to be the separate political community contemplated by the Constitution). Consistent with this principle, as the Court of Appeals recognized, 7-a, state residency requirements further the legitimate state interest of fostering loyalty and a stronger sense of identification with the State among its public officers. In addition, state residency requirements further the legitimate goal of encouraging migration into the state.

It is rational for New York State to permit New York City firefighters to live in six adjoining counties but not in out-of-state counties, even though firefighters in those counties might be closer to New York City. There is no doubt that due process and equal protection permit a state to impose local geographic residency requirements. *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972), *dismissing for want of a substantial federal question*, 385 Mich. 519, 190 N.W.2d 97 (1972). In that case, the Michigan Supreme Court held that a Detroit ordinance requiring police officers to reside in the city was not irrational and did not violate the due process and equal protection clauses. As this Court later declared in *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 646 (1976) (per curiam), "[w]e have therefore held that this kind of ordinance is not irrational." *See also Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) (dismissal for want of a substantial federal question is a decision on the merits). The nonresident plaintiffs fail to mention either case.

It is similarly rational for a state to distinguish between current resident public employees and current nonresident public

employees in awarding benefits such as the limited amnesty here. Under well-settled law, a state may impose a residency requirement, applicable to the time an economic benefit is awarded, to determine who is to receive the benefit. This Court has repeatedly declared that appropriately defined and uniformly applied bona fide residency requirements may be used to determine who is eligible to receive economic benefits, such as appointments to the civil service, *McCarthy*, 424 U.S. at 647; lower tuition, *Martinez v. Bynum*, 461 U.S. 321, 326-29 (1983); welfare, *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969); free medical care, *Memorial Hospital v. Marcicopa County*, 415 U.S. at 255, 267; and hunting licenses, *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978). Indeed, states may even impose such bona fide residency requirements to determine who may exercise the fundamental right to vote. *Dunn v. Blumstein*, 405 U.S. at 343. In approving such requirements this Court has always been careful to distinguish between bona fide residency requirements and durational or retroactive fixed date residency requirements.

This Court has never wavered from this distinction between current and retrospective residency requirements. In *Attorney General of the State of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the plurality opinion recognized that distinctions between current residents and current nonresidents at the time of the award of bonus points for veterans seeking civil service appointments or promotions were constitutional. It was the permanent deprivation of this "significant benefit, based only on the fact of nonresidence at a *past* point in time," which "clearly operate[d] to penalize appellees[] for exercising their rights to migrate." *Id.* at 909 (emphasis supplied).

The Court in Soto-Lopez saw no constitutional objection to limiting the preferences to persons resident at the time of the award:

> Once veterans establish bona fide residence in a State, they "become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State." For as long as New York

> chooses to offer its resident veterans a civil service employment preference, the Constitution requires that it do so without regard to residence at the time of entry into the services.

Id. at 911-12 (footnote and citations omitted) (brackets by Court).

Sections 3(19) and 30(5-a) of the Public Officers Law rationally further legitimate state interests under the principles outlined above. First, since state residency requirements further the legitimate state interest of fostering loyalty and a stronger commitment to the state among its public officers, New York rationally excused its residents who were not residents of the permitted counties and who had relied on non-enforcement, but did not excuse nonresidents who, while they also had relied on non-enforcement, were not sufficiently identified with the State to have loyalty to it.

The rationality of the amendments is further bolstered by the limited nature of the amnesty afforded New York residents. If New York residents who reside outside the permitted counties ever move to new homes, they, like out-of-state residents, must move into the permitted counties. Thus, neither nonresidents nor residents living outside the permitted counties are permitted to move into a non-permitted county. Both classes, therefore, are treated similarly in this respect.

Thus, the amendments are a rational scheme intended to achieve the legitimate goal of ensuring that all New York firefighters are state residents while subordinating its secondary interest of local residency only to the limited extent of permitting state residents who have relied on non-enforcement to remain in their communities so long as they remain in the same house they purchased in reliance on non-enforcement.

Finally, the distinction between current residents who receive the limited amnesty and current nonresidents who do not is permissible because it is based on current residence, not residence at some past time. The challenged sections of the Public Officers Law, enacted only *after* the administrative deadline to

comply with state and local residency requirements had expired and the nonresident plaintiffs failed to comply, impose a bona fide current residency requirement which operates prospectively. All current employees who were violating both state and local residency requirements on the effective date of the amendments and had failed to take advantage of the previous administrative amnesty were granted an additional one year to comply. The express words of these sections, which were effective immediately, 1986 N.Y. Laws, ch. 509, § 2, make it clear that they required current employees then violating long-established residency requirements to comply and did not penalize current employees based on prior violations:

> Any person who *resides* in this state and who is *currently employed* as . . . a paid member of the uniformed force of a paid fire department . . . of a city of over one million population, shall be exempt from the provisions of subdivisions one, two and nine of this section . . . Any person seeking to benefit from the exemption created by this subdivision shall notify his respective employer in writing of said intention within thirty days from the effective date of this subdivision and shall specify his *then current* residence address. The exemption created by this subdivision shall be applicable only to said actual designated residence and not to any residence that any subject *currently employed* member may thereafter establish; provided, however, that any such *currently employed* member who *resides* outside this state *shall have one year* from the effective date of this subdivision *within which to establish residence* as required pursuant to subdivisions one, two and nine of this section and comply with the notice requirements of this subdivision.

N.Y. Pub. Off. Law § 3(19) (McKinney 1988) (emphasis supplied). Thus, the words of the statute themselves demonstrate that the plaintiffs' contention that the challenged sections deny them the equal protection of the law because these provisions distinguish between residents based on nonresidence at a *past* point in time, jurisdictional statement at 45-46, is without merit.

POINT II

A NEW YORK STATUTE REQUIRING FIREFIGHTERS TO BE RESIDENTS DOES NOT DENY PLAINTIFFS ANY OF THE PRIVILEGES AND IMMUNITIES OF CITIZENSHIP AND PRESENTS NEITHER SPECIAL NOR IMPORTANT REASONS MERITING REVIEW

As this Court has made clear, access to public employment is not a privilege or immunity of citizenship protected by article IV, section 2 of the United States Constitution. Since it is not, this Court need not determine whether the amendments are a closely related to the advancement of a substantial state interest. Therefore, the non-resident firefighters' claim under article IV, section 2, resting on private sector cases, is without merit.

Courts must undertake a two-step inquiry when evaluating privilege and immunity claims:

> First, the activity in question must be " 'sufficiently basic to the livelihood of the Nation'. . . as to fall within the purview of the Privileges and Immunities Clause. . . ." For it is " '[o]nly with respect to those "privileges" and "immunities" bearing on the vitality of the Nation as a single entity' that a State must accord residents and nonresidents equal treatment." Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial in-State interest.

Supreme Court of Virginia v. Friedman, 108 S. Ct. 2260, 2264 (1988) (citations omitted).

As this Court has explained, "[p]ublic employment, however, is *qualitatively different* from employment in the private sector; it is a subspecies of the broader opportunity to pursue a

common calling." *United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 219 (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (emphasis supplied)). In the *Camden* case, this Court carefully distinguished *private* employment on a public works project, which was protected by the privileges and immunities clause, from *public*, which was not.[5]

This Court adhered to this distinction in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). In that case, this Court distinguished the practice of law by private lawyers from employment as a government official and concluded that the practice of law was a fundamental right for purposes of the privileges and immunities clause. This analysis, as in the *Camden* case, would have been unnecessary had public employment been a privilege or immunity.

[5] Although working for a *private* employer on a public works project was "in a substantial if informal, sense, 'working for the city,' " 465 U.S. at 219, it was not sufficient to "remove the Camden ordinance completely from the purview of the Clause." *Id.* at 221. Such an analysis would have been unnecessary if public employment were a privilege or immunity.

CONCLUSION

For all the foregoing reasons, this Court should dismiss the appeal or, if it determines that the appeal should be deemed to be a petition for a writ of certiorari, it should deny the petition.

Dated: New York, New York
March 14, 1989

Respectfully submitted,

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